No. 95-1646

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1995

WHARF CABLE LIMITED,

Petitioner,

v.

UNITED INTERNATIONAL HOLDINGS, INC. AND UIH ASIA INVESTMENT CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

William R. Jentes
Counsel of Record
James C. Munson
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2200
Counsel for Petitioner
Wharf Cable Limited

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PARTIES TO THE PROCEEDING

A list of the corporate parties interested in this proceeding on Petitioner's behalf can be found in the Petition for Writ of Certiorari at page ii.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF AUTHORITIES iii

REPLY BRIEF IN SUPPORT OF PETITION 1

1. Other Circuits Dealing with the Same Arbitration Clause As the Tenth Circuit Have Refused to Let Plaintiffs Evade Arbitration by Adding Non-Signatories to Their Lawsuit 2

2. The Second Circuit, in Contrast to the Tenth Circuit, Has Decided Arbitrability on the Basis of the Underlying Factual Dispute Framed by the Party Seeking Arbitration 6

3. The Tenth Circuit's Decision Conflicts with the Strong Pro-Arbitration Policy of the Federal Arbitration Act, Particularly As Applied to International Disputes 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases **Page**

Ankenbrandt v. Richards,
504 U.S. 689 (1992) 5

Arnold v. Arnold Corp.,
920 F.2d 1269 (6th Cir. 1990) 2

AT&T Tech., Inc. v. Communications Workers of America,
475 U.S. 643 (1986) 7

Britton v. Co-Op Banking Group,
4 F.3d 742 (9th Cir. 1993) 5

Collins & Aikman Prods. Co. v. Building Sys., Inc.,
58 F.3d 16 (2d Cir. 1995) 6-8

Contracting Northwest, Inc. v. City of Fredericksburg,
713 F.2d 382 (8th Cir. 1983) 4

Feist Pubs., Inc. v. Rural Tel. Serv. Co.,
499 U.S. 340 (1991) 5

Genesco, Inc. v. T. Kakiuchi & Co. Ltd,
815 F.2d 840 (2d Cir. 1987) 4

In re Oil Spill by Amoco Cadiz,
659 F.2d 789 (7th Cir. 1981) 2, 4

J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.,
863 F.2d 315 (4th Cir. 1988) 2, 3

Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 8

Morrie Mages & Shirlee Mages Foundation v. Thrifty Corp.,
916 F.2d 402 (7th Cir. 1990) 4-5

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 8

Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
7 F.3d 1110 (3d. Cir. 1993) 3-4

Sam Reisfeld & Son Import Co. v. S.A. Eteco,
530 F.2d 679 (5th Cir. 1976) 2

Spectrum Sports, Inc. v. McQuillan,
506 U.S. 447 (1993) 5

REPLY BRIEF IN SUPPORT OF PETITION

Respondents confuse the closing argument they hope to make to the jury with the questions presented on this Petition. The issue is not the merits (or demerits) of the parties' underlying claims, but whether the Tenth Circuit's refusal to apply the parties' written arbitration agreement to this important international dispute conflicts with the decisions of other circuits and this Court's over-arching policy in favor of arbitration.

According to respondents, the conflict between the twin barriers to arbitration erected by the Tenth Circuit, and the rejection of those restraints by other circuits, is only a "contrivance." Respondents' Brief in Opposition ("Opp.") at 16, 21. To the contrary, it is respondents (1) who have misstated the plain language of the parties' arbitration clause in their effort to deny a conflict with the Fourth, Fifth, Sixth and Seventh Circuits, and (2) who have avoided the conflict with the Second Circuit only by failing, as did the Tenth Circuit, to address its most recent rulings on arbitrability.

The practical and policy implications of these conflicts are serious. Parties desiring the benefits of international arbitration must know what is required of them. Here, petitioner used the broad arbitration clause specifically recommended by the International Chamber of Commerce and widely used by the international business community. Yet, the Tenth Circuit let respondents circumvent that clause by suing petitioner's corporate affiliates and principal officer, and by purporting to base their claims on a superseding "oral contract" that was specifically precluded by the parties' written agreement. It is a result that bodes ill for the strong federal policy in favor of arbitral dispute resolution.

1. Other Circuits Dealing with the Same Arbitration Clause As the Tenth Circuit Have Refused to Let Plaintiffs Evade Arbitration by Adding Non-Signatories to Their Lawsuit.

The Fourth, Fifth, Sixth and Seventh Circuits have all refused to allow a plaintiff to avoid its arbitration obligations by the device of joining parties to its lawsuit who were not signatories to the arbitration agreement. *See* Petition For Writ of Certiorari ("Pet.") at 9-11 (citing *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679 (5th Cir. 1976); *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990); *In re Oil Spill by Amoco Cadiz*, 659 F.2d 789 (7th Cir. 1981)). As the Sixth Circuit correctly pointed out:

> "[If a party] can avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as [defendants] in his complaint, or signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified." *Arnold*, 920 F.2d at 1281 (internal quotations omitted) (citations omitted).

The Seventh Circuit further underscored that,

> "It would advance neither judicial economy nor the purposes of the federal arbitration act . . . to allow [a plaintiff] to defeat the effect of an arbitration agreement by joining a nonsignatory as a party-plaintiff in its complaint." *Amoco Cadiz*, 659 F.2d at 796.

Respondents seek to distinguish these cases and their reasoning on the ground that they purportedly involved different arbitration clauses from those at issue here. Respondents rely on the first sentence of the Technical Cooperation Agreement's arbitration clause for their claim that

it is restricted to disputes "between the parties." Opp. at 2-3, 20. What respondents overlook is that the second sentence of section 13.2 of the clause has *no such parties limitation* and is explicit that:

> "*Notwithstanding the first sentence*, any disputes arising from, or in connection with this Agreement shall be arbitrated in Hong Kong." TCA ¶13.2, *quoted in* Opp. at 2 (emphasis added).

The second sentence directly parallels the arbitration clauses before the Fourth, Fifth, Sixth and Seventh Circuits. Most notably, its coverage of "any disputes arising from, or in connection with this Agreement" is identical to the clause recommended by the International Chamber of Commerce that was also at issue in *Ryan*. *See* 863 F.2d at 318. The Fourth Circuit specifically held that such a clause could be invoked by Rhone Poulenc, even though it was not a signatory to the arbitration agreement with its subsidiaries, because the clause "embraces every dispute between the parties having a significant relationship to the contract." *Id.* at 320-21.

In short, respondents are wrong that linguistic differences can explain the sharp divergence between the results in other circuits and the decision below.[1] Indeed, even where the arbitration clauses at issue were limited to "all controversies which may arise between us," the Third Circuit held that they "should be read to include all of the named defendants even though only one defendant signed them." *Pritzker v. Merrill*

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[1] For related reasons, respondents are mistaken in their reliance on cases where the arbitration clauses *were* limited to disputes "between the parties" and the courts refused to order arbitration by non-signatories. *See* Opp. at 19 n.9. Not only were the arbitration clauses more restrictive than the one here, but the signatories were not even named as defendants in the underlying litigation, eliminating the basis for arbitration.

Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112, 1114 (3d Cir. 1993). In particular, the court required arbitration of claims against an affiliated subsidiary of Merrill Lynch, even though it was neither an agent nor a signatory, on the ground that "arbitration agreements may be upheld against non-parties where the interests of such parties are directly related to, if not congruent with, those of a signatory." *Id.* at 1122.

Respondents are also wrong in their attempt to distinguish *Amoco Cadiz* on the ground that plaintiffs' claims in this case are "brought on their *own* behalf, *not* on behalf of another person." Opp. at 21 (emphasis in original). This may be true, but respondents' complaint makes clear that UIH Asia's claims derive solely from UIHI; there is no allegation that UIH Asia had any dealings with Wharf. Am. Cmpl. ¶¶17-69. As the Seventh Circuit cogently remarked in ordering the non-signatory plaintiff to arbitration in *Amoco Cadiz*: "Having alleged an agency relationship as a basis for its standing in the suit, it cannot slough off that relationship at will." 659 F.2d at 796.

Finally, even if plaintiffs were correct that only signatories could be bound, this litigation should still not proceed in the district court. Just because *some* parties or claims are not subject to arbitration does not mean that *all* are not subject to arbitration. Since UIHI and Wharf Cable are plainly bound as signatories, the Tenth Circuit should, at the very least, have required arbitration of their dispute, while staying all remaining litigation. *See, e.g., Contracting Northwest, Inc. v. City of Fredericksburg*, 713 F.2d 382, 386-87 (8th Cir. 1983) (where some, but not all, parties will arbitrate core dispute, "considerations of judicial economy and avoidance of confusion and possible inconsistent results . . . militate in favor of staying the entire action"); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 856 (2d Cir. 1987); *Morrie Mages & Shirlee*

Mages Found. v. Thrifty Corp., 916 F.2d 402, 405-08 (7th Cir. 1990).

Contrary to respondents' contention, petitioner does not urge the adoption of "a categorical rule that claims involving nonsignatories are *always* arbitrable." Opp. at 17 (emphasis in original). What petitioner does urge is that this Court reject the Tenth Circuit's rule that a plaintiff can avoid arbitration by the expedient of adding non-signatory parties. Respondents' argument that they have drafted their complaint to focus on non-signatories only highlights their scheme to push the real parties in interest to the periphery of their suit.

It is no answer that the Tenth Circuit, like the Ninth Circuit in *Britton v. Co-Op Banking Group*, 4 F.3d 742 (9th Cir. 1993), has allowed non-signatories to obtain the benefits of arbitration where they establish a formal third party beneficiary claim. Such a limited exception is contrary to "contemporary federal principles on the issue of arbitrability," as the dissent in *Britton* pointed out. *Id.* at 748. The proper rule is one that carries out the pro-arbitration philosophy of the Federal Arbitration Act by allowing non-signatories, and especially corporate affiliates and officers, to obtain the benefits of arbitration where their interests so closely parallel those of the signatories that considerations of efficiency and judicial economy favor arbitration of all parties' claims and defenses.[2]

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[2] It is also no answer that the Tenth Circuit's opinion is unpublished. Opp. at 16. It is actually worse, because the international business community needs certainty in drafting arbitration agreements, and the published law from other circuits manifestly favors sending this case to arbitration. Under these circumstances, this Court has reviewed unpublished opinions from the Tenth Circuit and elsewhere. *See, e.g., Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993); *Ankenbrandt v. Richards*, 504 U.S. 689 (1992); *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).